No. 13602

United States
Court of Appeals
for the Ninth Circuit.

JAMES V. McCONNELL and MARGOT MURPHY McCONNELL,

Appellants,

vs.

PICKERING LUMBER CORPORATION,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Northern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—1-30-53

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INDEX

[Clerk's Note: When deemed likely to be of an important nature errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appear ing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX

NAMES OF ATTORNEYS OF RECORD

HERBERT BARTHOLOMEW,
1240 Merchants Exchange Bldg.,
San Francisco 4, California;

PEMBROKE GOCHNAUER,
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San Francisco 4, California,

Attorneys for Plaintiffs.

JOHN F. DOWNEY,
RALPH R. MARTIG,
DOWNEY, BRAND, SEYMOUR & ROHWER,
500 Capital National Bank Building,
Sacramento 14, California,

Attorneys for Defendant Pickering Lumber Company, a Corporation.

In the District Court of the United States for the Northern District of California, Northern Division

No. 6532

JAMES V. McCONNELL and MARGOT MURPHY McCONNELL,

Plaintiffs,

vs.

PICKERING LUMBER CORPORATION, a Corporation, DOE ONE, DOE TWO, and DOE THREE,

Defendants.

COMPLAINT

Plaintiffs complain of defendants, and each of them, and for cause of action allege:

I.

The jurisdiction of this court is invoked under the provisions of Title 28 U.S.C.A., Section 1332. Plaintiffs are citizens of the State of New York. Pickering Lumber Corporation is a corporation incorporated under the laws of the State of Delaware. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

II.

Plaintiffs James V. McConnell and Margot Murphy McConnell, at all times hereinafter mentioned were, and they now are, husband and wife. On April 10, 1946, and all times mentioned herein prior

thereto, plaintiff Margot Murphy McConnell was the owner of an undivided fractional interest in certain lands in Tuolumne County, California, commonly known as the McArthur and Ducey lands, together with the timber thereon.

III.

The true names and capacities, whether corporate, associate or otherwise, of defendants Doe One, Doe Two and Doe Three are unknown to plaintiffs and plaintiffs therefore designate them by such fictitious names and when their true names are discovered this complaint will be amended accordingly.

IV.

Pickering Lumber Corporation (hereinafter sometimes referred to as "defendant corporation") is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with principal offices and place of business in Kansas City, Missouri. Said corporation at all times herein mentioned has been, and it now is, transacting business in California, and has designated D. H. Steinmetz, Standard, California, as its agent in California for the service of process. At all times mentioned herein defendant corporation has been, and it now is, engaged in the business of purchasing, cutting, milling, selling and distributing timber and lumber. In the contract attached hereto as Exhibit A, plaintiffs are designated as "Seller" or "Sellers" and defendant corporation is designated as "Purchaser."

V.

On the 10th day of April, 1946, defendant corporation made and entered into a written agreement with plaintiffs, in the above-entitled District and Division, concerning the acquisition by defendant corporation of plaintiffs' undivided fractional interest in said McArthur and Ducey lands and timber. A true copy of said agreement, with its attached Schedules A and B, is annexed hereto, marked "Exhibit A" and by this reference incorporated herein. Said lands consist of 154 parcels of 40 acres, or approximately 40 acres, each, and aggregate 6,172.60 acres, lying in the County of Tuolumne, State of California, and at the time of the negotiation of the aforesaid agreement said lands were held in undivided ownership as follows:

John F. Ducey, Detroit, Michigan—494.8/1360 undivided fractional interest, or the equivalent of approximately 2245.402 acres if divided.

Pickering Lumber Corporation (a defendant herein)—272/1360 undivided fractional interest, or the equivalent of approximately 1234.336 acres if divided.

Margot Murphy McConnell (a plaintiff herein), New York, New York—248.2/1360 undivided fractional interest, or the equivalent of approximately 1126.33 acres if divided.

Robert A. McArthur, Detroit, Michigan—130/1360 undivided fractional interest, or the equivalent of approximately 589.94 acres if divided.

Percy A. McArthur, Detroit, Michigan—117/1360

undivided fractional interest or the equivalent of approximately 530.946 acres if divided.

Ernest H. Fontaine, Jr., Trustee, Detroit, Michigan—85/1360 undivided fractional interest, or the equivalent of approximately 385.73 acres if divided.

Lawrence L. Brotherton, Detroit, Michigan—13/1360 undivided fractional interest, or the equivalent of approximately 58.994 acres if divided.

VI.

Section 10 of the agreement between plaintiffs and defendant corporation (Exhibit A) provides as follows:

"10-(A) Should Purchaser at any time prior to July 1, 1950, acquire the 494.8/1360 fractional interest of John F. Dusey in the property listed in Schedule A from him, his heirs or assigns or representatives, directly or indirectly, or at a partition sale of all the property described in Schedule A at a price higher than that provided herein for Sellers' interest, then Purchaser and Sellers hereby agree that the price provided in this contract for the Sellers' interest shall forthwith be adjusted upward by the amount necessary to make up the difference. Such additional amount shall be paid by Purchaser to Sellers as follows:

> "(a) The additional amount due on all deeds taken up by Purchaser under this agreement prior to the date of purchase of such John F. Ducey interest shall be paid by Purchaser to Escrow Agent for the account of Sellers within 15 days;

"(b) The additional amount due on deed or deeds remaining in the possession of Escrow Agent at date Purchaser acquired the John F. Ducey interest shall be paid by Purchaser to Escrow Agent for the account of Sellers when Purchaser calls on Escrow Agent for delivery of any or all such remaining deeds.

"(B) The Purchaser further agrees with the Seller that, in the event it should purchase the said John F. Ducey interest at any time on or before July 1, 1950, that it will, within fifteen (15) days after making said purchase mail to the address of the Seller, notice of said purchase and the terms and conditions of same."

VII.

During the month of February, 1949, plaintiffs discovered that theretofore and on or about December 9, 1947, defendant corporation had acquired the 494.8/1360 fractional interest of John F. Ducey in and to certain parcels of said McArthur and Ducey lands (which parcels, plaintiffs have since learned, amounted to 40 parcels aggregating 1599.22 acres), at a price greatly in excess of the price of seventy-five dollars ($75.00) per acre heretofore paid to plaintiffs for their fractional interest therein. Plaintiffs have been unable to ascertain the exact price per acre paid by defendant corporation to said John F. Ducey, but believe said price to be approximately One Hundred Fifty Dollars ($150.00) per acre. Plaintiffs have done all things required to be done by them under the terms of

their said agreement with defendant corporation (Exhibit A) and allege that defendant corporation, in accordance with the provisions of said agreement, owes plaintiffs an amount of money equal to the difference between the price of Seventy-five Dollars ($75.00) per acre heretofore paid by defendant corporation to plaintiffs and the higher price per acre heretofore paid by defendant corporation in acquiring said interest of said John F. Ducey, together with interest thereon from the time said amount or amounts should have been paid to Escrow Agent for the account of plaintiffs as required by said agreement (Exhibit A).

VIII.

Defendant corporation has never notified plaintiffs of its said purchase of said John F. Ducey's interest as provided in subparagraph (B) of paragraph 10, quoted in Paragraph VI of this complaint, and has never paid any additional amount or amounts to the Escrow Agent for the account of plaintiffs, as provided in subparagraphs (a) and (b) of said paragraph 10-(A).

IX.

Plaintiffs are informed and believe and therefore allege defendant corporation rests its contention that it does not owe plaintiffs any amount or amounts of money under the terms of said paragraph 10, set forth in Paragraph VI of this complaint, upon the claim that the language of said paragraph 10 relieves it from the obligation to pay any additional amount to plaintiffs because it did

not acquire, prior to July 1, 1950, the 494.8/1360 fractional interest of said John F. Ducey in all 154 parcels of the said McArthur and Ducey lands, but only in 40 parcels thereof.

X.

Plaintiffs deny that the language of the said paragraph 10 of Exhibit A can be interpreted to excuse defendant corporation from paying to plaintiffs an amount equal to the difference between the price of Seventy-five Dollars ($75.00) per acre paid to plaintiffs and the higher price per acre paid by the defendant corporation to said John F. Ducey, and assert that the provisions, properly read, state that should defendant corporation, at any time prior to July 1, 1950, acquire the 494.8/1360 fractional interest of said John F. Ducey in all or in any parcels of the said lands at a higher price per acre than the price of Seventy-five Dollars ($75.00) per acre, then the said price of Seventy-five Dollars ($75.00) per acre should be forthwith adjusted upward by the amount necessary to make up the difference.

XI.

If the language of paragraph 10-(A) quoted in Paragraph VI of this complaint is susceptible of the interpretation now placed upon it and now relied upon by defendant corporation, then the said language, so interpreted, does not truly express the intention of the parties thereto at the time of the execution of said agreement.

In this regard plaintiffs allege:

1. Prior to the execution of said agreement defendant corporation, acting by and through its then president, Ben Johnson, informed plaintiffs that defendant corporation wanted to purchase the fractional interest of said John F. Ducey in all of said lands and the fractional interest of each other co-owner in all of said lands, and that defendant corporation never would purchase, nor consider the purchase of, the fractional interest of said John F. Ducey, nor of any other of the co-owners, in any particular parcel or parcels of said lands nor any fractional interest in less than all of said lands. Plaintiffs believed said statements and at no time thereafter during the negotiations leading up to the execution of said agreement, which negotiations occurred over a period of several months, did the parties thereto consider nor discuss the purchase by defendant corporation of the fractional interest of said John F. Ducey, nor of any other co-owner, in only a part of said lands, nor the price to be paid plaintiffs in the event defendant corporation should thereafter acquire the fractional interest of said John F. Ducey in only a part of said lands. Defendant corporation prepared the written agreement (Exhibit A), including the language of paragraph 10-(A) thereof, and submitted the same to plaintiffs for their signature, and plaintiffs signed said agreement in the belief that it truly expressed the intentions of each party thereto. Plaintiffs therefore allege that Exhibit A was executed under a mutual mistake of each party thereto as to the

meaning and effect of paragraph 10 thereof in the event defendant corporation should acquire, on or before July 1, 1950, the fractional interest of said John F. Ducey in a part or parts of, but less than all of, said lands.

2. In the event said agreement was not executed under a mutual mistake of each party thereto as alleged in subparagraph 1. above, then and in that event, said agreement was executed under a mistake of plaintiffs as alleged in subparagraph 1. above, which defendant corporation at the time of execution thereof knew or suspected; at all times mentioned herein prior to the execution of said agreement defendant corporation knew or suspected that plaintiffs were unwilling to dispose of their fractional interest in said lands and to place in escrow deeds thereto for future delivery during the period from April 10, 1946, to July 1, 1950, at a price of Seventy-five Dollars ($75.00) per acre, unless they should receive as additional consideration therefor the difference in price between Seventy-five Dollars ($75.00) per acre and any higher price per acre provided in any agreement between defendant corporation and said John F. Ducey by which defendant corporation should acquire prior to July 1, 1950, the fractional interest of said John F. Ducey in all of or in any part or parts of said lands; and at the time of the execution of said agreement defendant corporation knew or suspected that plaintiffs would not execute said agreement if the language of paragraph 10-(A) thereof were susceptible of the inter-

pretation now placed upon it and now relied upon, by defendant corporation, namely, that paragraph 10 thereof should not apply in the event defendant corporation, at any time prior to July 1, 1950, should acquire the fractional interest of said John F. Ducey in a part of, but less than all of, said lands.

Wherefore, plaintiffs pray judgment against the defendant corporation as follows:

1. That the court declare that plaintiffs are entitled, under the terms of the agreement (Exhibit A) to receive from the defendant corporation such amount or amounts of money as may be found necessary to make up the difference between the price of Seventy-five Dollars ($75.00) per acre at which defendant corporation acquired plaintiffs' interest, and the higher price per acre at which defendant corporation acquired the interest of said John F. Ducey, in certain parcels of said lands, together with interest thereon from the time the same should have been paid in accordance with the terms set forth in subparagraphs (a) and (b) of paragraph 10-(A) of said agreement.

2. That if the language of the contract does not mean what plaintiffs claim it means, as stated in Paragraph X of this complaint, that by decree of this court the aforesaid agreement be reformed to conform with the actual agreement of the parties as alleged in Paragraph X of this complaint by the addition of the words "any of" after the word "in" and preceding the words "the property listed"

in the third line of paragraph 10-(A) of said agreement.

3. That the court decree that under the said agreement so reformed defendant corporation owes plaintiffs such amount or amounts of money as may be found necessary to make up the difference between the price of Seventy-five Dollars ($75.00) per acre at which defendant corporation acquired plaintiffs' interest, and the higher price per acre at which defendant corporation acquired the interest of said John F. Ducey, in a part of said lands, together with interest thereon from the time the same should have been paid in accordance with subparagraphs (a) and (b) of paragraph 10-(A) of said agreement.

4. For interest, costs of suit, and such and other and further relief as to the court may seem proper.

/s/ HERBERT BARTHOLOMEW,

/s/ PEMBROKE GOCHNAUER.

EXHIBIT A

An Agreement to Purchase and Sell entered into between Pickering Lumber Corporation, hereinafter referred to as Purchaser, and Margot Murphy McConnell and James V. McConnell, her husband, hereinafter referred to as Seller.

The date of this agreement is July 1, 1945.

The Sellers warrant that they own 248.2/1360 fractional interest in the McArthur and Ducey lands

in Tuolumne County, California as set out in Schedule "A" attached and agree to sell all their rights, title and interest therein at the rate of $75.00 per acre, or a total consideration of $84,-474.87.

Terms:

(a) 20% ($16,894.97) is to be paid in cash to the Escrow Agent at the time of the closing of the transaction, delivery of the deeds and title insurance and signing of the Escrow Agreement.

(b) As to the balance, $67,579.90, payment is to be completed on or before July 1, 1950, and at not less than the rate of $13,515.98 on or before July 1, 1946-1947-1948-1949-1950. The Purchaser shall have the right to deposit with the said Escrow Agent at any time any sums that Purchaser may wish to deposit in addition to the minimum payments required as above set forth. In the event the Purchaser should deposit with said Escrow Agent any sum in excess of the minimum payments above set forth, such excess shall be credited toward the payment falling due for the next or succeeding years.

No interest is to be paid on the deferred deeds.

The Bank of America is to act as Escrow Agent under the transaction.

Twenty-five (25) deeds covering various parcels of the lands as selected by the Purchaser are to be deposited with the Escrow Agent and the full consideration for each deed shall be arrived at as stated above, less the 20% thereof paid in advance as specified above.

The Purchaser shall have the right to take up any deed it may select from the Escrow Agent and the Escrow Agent shall promptly deliver such deed to the Purchaser when there is a sufficient credit in Escrow Agent's hands to cover the payment specified for such deed.

Other Conditions:

1. The Purchaser will pay at its expense all taxes on the property involved for the fiscal year beginning July 1, 1945, and agrees to pay promptly the installments of future taxes when due.

2. The Sellers agree to warrant the title and furnish title policy at their expense, but the Purchaser agrees that the Escrow Agent may make the initial cash payment of 20% specified under "Terms (a)" in advance of the delivery of the title policy.

3. The grazing rights on all the lands embraced in this deal are granted to the Purchaser, beginning with the year 1946.

4. The contract will specify the valuation of and the balance due for taking up each deed.

5. No timber shall be cut off the lands described in any of the deeds covered by this contract until the Purchaser has received from the Escrow Agent the deed covering the land from which the timber is to be cut.

6. The Sellers will agree in the contract and/or in the Short Form of Agreement to convey rights-

of-way and easements to locate, construct, use and operate over, on, and across the land of the Seller described in the deferred deeds, such roads, railroads, skid roads, logging roads, camps and other facilities as may be reasonably necessary in connection with Purchaser's lumber and logging operations.

7. Copy of this contract, together with the deeds referred to herein shall be escrowed with the Bank of America at the Sellers' expense.

8. Appropriate Short Form of Agreement shall be executed covering the transactions.

9. Revenue Stamps on each deed to be canceled at expense of Seller at the time such deed is delivered to Pickering Lumber Corporation.

10-(A). Should Purchaser at any time prior to July 1, 1950, acquire the 494.8/1360 fractional interest of John F. Ducey in the property listed in Schedule A from him, his heirs or assigns or representatives, directly or indirectly, or at a partition sale of all the property described in Schedule A at a price higher than that provided herein for Sellers' interest, then Purchaser and Sellers hereby agree that the price provided in this contract for the Sellers' interest shall forthwith be adjusted upward by the amount necessary to make up the difference. Such additional amount shall be paid by Purchaser to Sellers as follows:

(a) The additional amount due on all deeds taken up by Purchaser under this agree-

ment prior to the date of purchase of such John F. Ducey interest shall be paid by Purchaser to Escrow Agent for the account of Sellers within 15 days;

(b) The additional amount due on deed or deeds remaining in possession of Escrow Agent at date Purchaser acquired the John F. Ducey interest shall be paid by Purchaser to Escrow Agent for the account of Sellers when Purchaser calls on Escrow Agent for delivery of any or all such remaining deeds.

(B). The Purchaser further agrees with the Seller that, in the event it should purchase the said John F. Ducey interest at any time on or before July 1, 1950, that it will, within fifteen (15) days after making said purchase, mail to the address of the Seller, notice of said purchase and the terms and conditions of same.

Signed 6 April 1946.

/s/ MARGOT MURPHY McCONNELL,

JAMES V. McCONNELL,

By /s/ JOHN L. McCORMICK,
Attorney.

Signed 10 April 1946.

PICKERING LUMBER CORPORATION,

By BEN JOHNSON,
President.

"Schedule A"

Description of McArthur & Ducey Lands in Tuolumne County, California

Description	Acreage
T. 5 N. R. 16 E.	
Sec. 1—NW NE	37.45
SW NE	40
SE NE	40
NE NW	37.35
NW NW	37.25
SW NW	40
SE NW	40
NE SW	40
NW SW	40
NE SE	40
NW SE	40
SE SE	40
Sec. 2—NE NW	37.14
NW NW	37.11
NE SE	40
Sec. 3—NE NE	36.96
NW NE	36.69
SW NE	40
NE SW	40
SW SW	40
SE SW	40
NW SE	40
Sec. 4—SW SE	40
SE SE	40

Description	Acreage
Sec. 9—NE SW	40
SW SW	40
SE SW	40
NW SE	40
Sec. 10—SW NE	40
SE NE	40
NW NW	40
NE SW	40
SE SW	40
NE SE	40
NW SE	40
Sec. 11—NE NE	40
SW NE	40
SE NE	40
NE NW	40
SW NW	40
SE NW	40
NE SW	40
NW SW	40
NE SE	40
NW SE	40
SW SE	40
Sec. 12—NE SW	40
NW SW	40
SW SW	40
SE SW	40
NE SE	40
NW SE	40
SW SE	40

Description	Acreage
Sec. 13—NE NE	40
NW NE	40
SW NE	40
SE NE	40
NE NW	40
NW NW	40
SW NW	40
SE NW	40
NE SE	40
NW SE	40
SW SE	40
SE SE	40
Sec. 14—NW NE	40
SW NE	40
NE NW	40
SW NW	40
SE NW	40
NW NW	40
Sec.15—SE NE	40
Sec. 17—NE NE	40
NW NE	40
SE NE	40
NE SE	40
T. 5 N. R. 17 E.	
Sec. 4—NE NW	40.05
SW NW	40
SE NW	40
Sec. 5—SE NE	40
NW NW	38.55
SW SW	40

Description	Acreage
Sec. 6—NE NE	38.30
NW NE	38.10
SW NE	40
SE NE	40
NE NW	37.90
NW NW	38.03
SW NW	40.84
SE NW	40
NE SW	40
SE SW	40
Sec. 7—NE NE	40
NW NE	40
SW NE	40
NE NW	40
SE NW	40
NE SW	40
NW SW	42.10
SE SW	40
NW SE	40
SW SE	40
Sec. 8—NE NW	40
NW NW	40
SE SW	40
SW SE	40
Sec. 17—NE NE	40
NW NE	40
Sec. 19—NE NE	40

Description	Acreage
Sec. 20—NW NE	40
NE NW	40
NW NW	40
T. 6 N. R. 16 E.	
Sec. 25—NE SE	40
NW SE	40
SW SE	40
SE SE	40
Sec. 35—NE SW	40
NW SW	40
SW SW	40
SE SW	40
NE SE	40
NW SE	40
SW SE	40
SE SE	40
T. 6 N. R. 17 E.	
Sec. 30—SW NW	38.74
SE NW	40
NE SW	40
NW SW	39.90
Sec. 31—SE SE	40
Sec. 32—SE NW	40
NE SW	40
SW SW	40
SE SW	40
NE SE	40
NW SE	40
SW SE	40

Description	Acreage
Sec. 33—SW NW	40
SE NW	40
NE SW	40
NW SW	40
T. 4 N. R. 15 E.	
Sec. 1—NE NW	39.22
SE NW	40
NE SW	40
NW SW	40
SW SW	40
SE SW	40
T. 4 N. R. 15 E.	
Sec. 12—SW NE	40
NW NW	40
SE NW	40
NE SW	40
SE SW	40
Sec. 13—NW NW	40
SW NW	40
Sec. 14—NE NE	40
SE NE	40
Total Acreage	6,171.68

SCHEDULE B

248.2/1360ths Interest
McArthur & Ducey Land and Timber

6,171.68 Acres

Recapitulation

Deed No.	Acres	Total Purchase Price	Less 20% Advance	Net Amount Due
1	240.	$ 3,285.00	$ 657.00	$ 2,628.00
2	280.	3,832.50	766.50	3,066.00
3	240.	3,285.00	657.00	2,628.00
4	360.	4,927.50	985.50	3,942.00
5	242.10	3,313.74	662.75	2,650.99
6	280.	3,832.50	766.50	3,066.00
7	276.90	3,790.07	758.01	3,032.06
8	238.10	3,258.99	651.80	2,607.19
9	160.	2,190.00	438.00	1,752.00
10	275.93	3,776.79	755.36	3,021.43
11	240.	3,285.00	657.00	2,628.00
12	200.	2,737.50	547.50	2,190.00
13	160.	2,190.00	438.00	1,752.00
14	200.	2,737.50	547.50	2,190.00
15	360.	4,927.50	985.50	3,942.00
16	200.	2,737.50	547.50	2,190.00
17	240.	3,285.00	657.00	2,628.00
18	200.84	2,749.00	549.80	2,199.20
19	312.05	4,271.18	854.23	3,416.95
20	227.90	3,119.38	623.87	2,495.51
21	320.	4,380.00	876.00	3,504.00
22	318.64	4,361.39	872.28	3,489.11
23	239.22	3,274.33	654.87	2,619.46
24	200.	2,737.50	547.50	2,190.00
25	160.	2,190.00	438.00	1,752.00
Total	....6,171.68	$84,474.87	$16,894.97	$67,579.90

[Endorsed]: Filed August 23, 1951.

[Title of District Court and Cause]

NOTICE OF MOTION TO DISMISS

Defendant Pickering Lumber Corporation, a corporation, moves the Court to dismiss the action as to the defendant Pickering Lumber Corporation because the complaint fails to state a claim against said defendant upon which relief can be granted.

/s/ JOHN F. DOWNEY,
/s/ RALPH R. MARTIG,
DOWNEY, BRAND,
SEYMOUR & ROHWER,
Attorneys for Defendant Pickering Lumber Corporation, a Corporation.

To: Herbert Bartholomew, and Pembroke Gochnauer, Attorneys for Plaintiffs:

Please Take Notice, that defendant Pickering Lumber Corporation will bring the above motion on for hearing before this Court in the courtroom of said Court, in the Federal Building, 9th and I Streets, Sacramento, California, on the 29th day of October, 1951, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

/s/ JOHN F. DOWNEY,
/s/ RALPH R. MARTIG,
DOWNEY, BRAND,
SEYMOUR & ROHWER,
Attorneys for Defendant Pickering Lumber Corporation, a Corporation.

[Endorsed]: Filed October 9, 1951.

[Title of District Court and Cause]

ORDER

In their complaint plaintiffs seek to recover an additional sum from defendants based upon paragraph 10 of the contract between the parties hereto which provides for an increase of the price paid to plaintiffs for their undivided interest in several parcels of land equivalent to the amount greater than that received by them in the event that the interest of John F. Ducey in the parcels was sold. Plaintiffs contend Ducey sold his interest in a portion of the parcels for a higher price than received by the plaintiffs and plaintiffs interpret the contract to mean they should receive an equivalent increase on the theory that the agreement pertained to the sale of any number of parcels and not the entire unit. Defendants contend that the provision for an acceleration in the price would be effective only if Ducey's entire interest in all of the parcels was sold.

Plaintiffs pray—1, that the court declare that they are entitled to receive the higher price per acre because of the sale by Ducey of his interest in certain parcels; and 2, that if the language of the contract does not have the meaning plaintiffs attach to paragraph 10 that the agreement be reformed to conform with the actual agreement of the parties.

I do not find an ambiguity in the contract. It is therefore not subject to the interpretation which plaintiffs would place upon it. The allegations of

the complaint do not set forth an agreement by the parties other than the writing herein to which it could be reformed. The averments are insufficient to permit reformation on the ground of mistake. It follows that the complaint should be dismissed.

Defendant's motion to dismiss is granted and the complaint herein is dismissed with leave to plaintiffs to file within fifteen days from the date hereof an amended complaint setting forth sufficient allegations to present the question of the propriety of reforming the agreement herein.

Dated: November 7th, 1951.

/s/ DAL M. LEMMON,
United States District Judge.

[Endorsed]: Filed November 7, 1951.

[Title of District Court and Cause]

NOTICE OF MOTION TO VACATE ORDER DISMISSING THE COMPLAINT DATED AND FILED NOVEMBER 7, 1951, AND FOR LEAVE TO FILE AMENDED COMPLAINT

Plaintiffs above-named move the Court to vacate the Order of this Honorable Court dated and filed November 7, 1951, because the same is contrary to law, and for leave to file plaintiffs' Amended Com-

plaint, a copy of which is hereto attached and by this reference made a part of this Motion.

/s/ HERBERT BARTHOLOMEW,

/s/ PEMBROKE GOCHNAUER,
Attorneys for Plaintiffs.

To: John F. Downey, Ralph R. Martig, Downey, Brand, Seymour & Rohwer, Attorneys for Defendant Pickering Lumber Corporation, a corporation:

Please Take Notice that plaintiffs above named will bring the above Motion on for hearing before this Court in the courtroom of said Court, in the Federal Building, 9th and I Streets, Sacramento, California, on the 3rd day of December, 1951, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

/s/ HERBERT BARTHOLOMEW,

/s/ PEMBROKE GOCHNAUER,
Attorneys for Plaintiffs.

[Endorsed]: Filed November 23, 1951.

[Title of District Court and Cause]

MEMORANDUM

Plaintiffs' motion for leave to file their amended complaint is granted.

The submission of plaintiff's motion to vacate the order of this court dated November 7, 1951, is set

aside. It will be resubmitted upon submission of any motion attacking the amended complaint.

Dated: January 3rd, 1952.

/s/ DAL M. LEMMON,
United States District Judge.

[Endorsed]: Filed January 3, 1952.

[Title of District Court and Cause]

AMENDED COMPLAINT

Plaintiffs complain of defendants, and each of them, and for cause of action allege:

I.

The jurisdiction of this court is invoked under the provisions of Title 28 USCA, Section 1332. Plaintiffs are citizens of the State of New York. Pickering Lumber Corporation is a corporation incorporated under the laws of the State of Delaware. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

II.

Plaintiffs James V. McConnell and Margot Murphy McConnell, at all times hereinafter mentioned were, and they now are, husband and wife. On April 10, 1946, and at all times mentioned herein prior thereto, plaintiff Margot Murphy McConnell was the owner of an undivided fractional interest in certain lands in Tuolumne County, California, com-

monly known as the McArthur and Ducey lands, together with the timber thereon.

III.

The true names and capacities, whether corporate, associate or otherwise of defendants Doe One, Doe Two and Doe Three are unknown to plaintiffs and plaintiffs therefore designate them by such fictitious names and when their true names are discovered this complaint will be amended accordingly.

IV.

Pickering Lumber Corporation (hereinafter sometimes referred to as "defendant corporation") is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with principal offices and place of business in Kansas City, Missouri. Said corporation at all times herein mentioned has been, and it now is, transacting business in California, and has designated D. H. Steinmetz, Standard, California, as its agent in California for the service of process. At all times mentioned herein defendant corporation has been, and it now is, engaged in the business of purchasing, cutting, milling, selling and distributing timber and lumber. In the contract attached hereto as Exhibit A, plaintiffs are designated as "Seller" or "Sellers" and defendant corporation is designated as "Purchaser."

V.

On the 10th day of April, 1946, defendant corporation made and entered into a written agree-

ment with plaintiffs, in the above-entitled District and Division, concerning the acquisition by defendant corporation of plaintiffs' undivided fractional interest in said McArthur and Ducey lands and timber. A copy of said agreement, with its attached Schedules A and B, is annexed hereto, marked "Exhibit A" and by this reference incorporated herein. Said lands consist of 154 parcels of 40 acres, or approximately 40 acres, each, and aggregate 6,172.60 acres, lying in the County of Tuolumne, State of California, and at the time of the negotiation of the aforesaid agreement said lands were held in undivided ownership as follows:

John F. Ducey, Detroit, Michigan—494.8/1360 undivided fractional interest, or the equivalent of approximately 2245.402 acres if divided.

Pickering Lumber Corporation (a defendant herein)—272/1360 undivided fractional interest, or the equivalent of approximately 1234.336 acres if divided.

Margot Murphy McConnell (a plaintiff herein), New York, New York—248.2/1360 undivided fractional interest, or the equivalent of approximately 1126.33 acres if divided.

Robert A. McArthur, Detroit, Michigan—130/1360 undivided fractional interest, or the equivalent of approximately 589.94 acres if divided.

Percy A. McArthur, Detroit, Michigan—117/1360 undivided fractional interest, or the equivalent of approximately 530.946 acres if divided.

Ernest H. Fontaine, Jr., Trustee, Detroit, Michigan—85/1360 undivided fractional interest, or the

equivalent of approximately 385.73 acres if divided.

Lawrence L. Brotherton, Detroit, Michigan—13/1360 undivided fractional interest, or the equivalent of approximately 58.994 acres if divided.

VI.

Section 10 of the agreement between plaintiffs and defendant corporation (Exhibit A) provides as follows:

"10-(A) Should Purchaser at any time prior to July 1, 1950, acquire the 494.8/1360 fractional interest of John F. Ducey in the property listed in Schedule A from him, his heirs or assigns or representatives, directly or indirectly, or at a partition sale of all the property described in Schedule A at a price higher than that provided herein for Sellers' interest, then Purchaser and Sellers hereby agree that the price provided in this contract for the Sellers' interest shall forthwith be adjusted upward by the amount necessary to make up the difference. Such additional amount shall be paid by Purchaser to Sellers as follows:

"(a) The additional amount due on all deeds taken up by Purchaser under this agreement prior to the date of purchase of such John F. Ducey interest shall be paid by Purchaser to Escrow Agent for the account of Sellers within 15 days;

"(b) The additional amount due on deed or deeds remaining in possession of Escrow Agent at date Purchaser acquired the John F. Ducey interest shall be paid by Purchaser to Escrow Agent for the account of Sellers when

Purchaser calls on Escrow Agent for delivery of any or all such remaining deeds.

"(B) The Purchaser further agrees with the Seller that, in the event it should purchase the said John F. Ducey interest at any time on or before July 1, 1950, that it will, within fifteen (15) days after making said purchase, mail to the address of the Seller, notice of said purchase and the terms and conditions of same."

VII.

During the month of February, 1949, plaintiffs discovered that theretofore and on or about December 9, 1947, defendant corporation had acquired the 494.8/1360 fractional interest of John F. Ducey in and to certain parcels of said McArthur and Ducey lands (which parcels, plaintiffs have since learned, amounted to 40 parcels aggregating 1599.22 acres), at a price greatly in excess of the price of Seventy-five Dollars ($75.00) per acre heretofore paid to plaintiffs for their fractional interest therein. Plaintiffs have been unable to ascertain the exact price per acre paid by defendant corporation to said John F. Ducey, but believe said price to be approximately One Hundred Fifty Dollars ($150.00) per acre. Plaintiffs have done all things required to be done by them under the terms of their said agreement with defendant corporation (Exhibit A) and allege that defendant corporation, in accordance with the provisions of said agreement, owes plaintiffs an amount of money equal to the difference between

the price of Seventy-five Dollars ($75.00) per acre heretofore paid by defendant corporation to plaintiffs and the higher price per acre heretofore paid by defendant corporation in acquiring said interest of said John F. Ducey, together with interest thereon from the time said amount or amounts should have been paid to Escrow Agent for the account of plaintiffs as required by said agreement (Exhibit A).

VIII.

Defendant corporation has never notified plaintiffs of its said purchase of said John F. Ducey's interest as provided in subparagraph (B) of paragraph 10, quoted in Paragraph VI of this complaint, and has never paid any additional amount or amounts to the Escrow Agent for the account of plaintiffs, as provided in subparagraphs (a) and (b) of said paragraph 10-(A).

IX.

Plaintiffs are informed and believe and therefore allege defendant corporation rests its contention that it does not owe plaintiffs any amount or amounts of money under the terms of said paragraph 10, set forth in Paragraph VI of this complaint, under the claim that the language of said paragraph 10 relieves it from the obligation to pay any additional amount to plaintiffs because it did not acquire, prior to July 1, 1950, the 494.8/1360 fractional interest of said John F. Ducey in all 154 parcels of the said McArthur and Ducey lands, but only in 40 parcels thereof.

X.

Plaintiffs deny that the language of the said paragraph 10 of Exhibit A can be interpreted to excuse defendant corporation from paying to plaintiffs an amount equal to the difference between the price of Seventy-five Dollars ($75.00) per acre paid to plaintiffs and the higher price per acre paid by the defendant corporation to said John F. Ducey, and assert that the provisions, properly read, state that should defendant corporation, at any time prior to July 1, 1950, acquire the 494.8/1360 fractional interest of said John F. Ducey in all or in any parcels of the said lands at a higher price per acre than the price of Seventy-five Dollars ($75.00) per acre, then the said price of Seventy-five Dollars ($75.00) per acre should be forthwith adjusted upward by the amount necessary to make up the difference.

XI.

If the language of paragraph 10-(A) quoted in Paragraph VI of this complaint is susceptible of the interpretation now placed upon it and now relied upon by defendant corporation, then the said language so interpreted does not truly express the intention of the parties thereto at the time of the execution of said agreement, and said agreement was executed by plaintiffs under a mistake on their part as to the meaning and effect thereof, which mistake was known or suspected by defendants at the time of the execution thereof. The circumstances constituting and giving rise to said mistake were as follows:

Plaintiffs executed said agreement under the understanding and belief that Section 10-(A) thereof meant plaintiffs should receive as the price of their interest in said McArthur-Ducey lands an amount equal to the difference between $75.00 per acre and any higher price per acre provided in any agreement between defendant corporation and said John F. Ducey made at any time prior to July 1, 1950, for the sale of said Ducey's interest in all of or any of said lands.

Soon after defendant corporation acquired in July, 1944, its said twenty per cent interest in said lands defendant corporation commenced negotiations with the owners of all other outstanding interests in said lands for the purchase of all outstanding interests. It was necessary for defendant corporation to acquire all outstanding interests in any parcel thereof before defendant corporation could cut any timber upon such parcel. The negotiations between defendant corporation and its co-owners were conducted in large part between defendant corporation and plaintiffs. All of said co-owners, except John F. Ducey, were then willing to sell their interests to defendant corporation if a fair price could be agreed upon. In March, 1945, plaintiff Margot McConnell met with all of her co-owners in Detroit, Michigan, and it was then agreed among them that all were willing to sell at that time at a price of $75.00 per acre. This fact was made known to defendant corporation. In June, 1945, defendant corporation prepared, signed and sent to its co-owners a proposed written agreement for the pur-

chase of all of their interests at a price of $75.00 per acre. Said proposed agreement contained the same or substantially the same provisions as "Exhibit A" except that it omitted any pricing clause such as Paragraph 10 of "Exhibit A." Said proposed written agreement was not accepted by plaintiffs or any of the other co-owners because John F. Ducey refused or failed to sign it. Commencing approximately in November, 1945, defendant corporation began negotiations with plaintiffs for the purchase of plaintiffs' interest alone and informed plaintiffs that if defendant corporation could not acquire the interests of the other co-owners by agreement with them the acquisition of plaintiffs' interest would improve the position of defendant corporation in the event the institution of a partition suit should become necessary.

From the inception of defendant corporation's efforts to acquire plaintiffs' interest separate and apart from the interests of the other co-owners, plaintiffs refused to sell their interest in said lands at a price of $75.00 per acre and informed defendant corporation that plaintiffs were unwilling to sell at said price, and that plaintiffs must receive price protection against the acquisition by defendant corporation prior to July 1, 1950, of any other interest therein at a higher price per acre. During subsequent negotiations it was orally agreed between them that any such price protection clause which might be finally agreed upon would refer only to any higher price per acre to be paid to John F. Ducey in view of the size of his fractional interest

and his past unwillingness to sell. During February, 1946, John F. Ducey, Robert A. McArthur, Percy A. McArthur and Ernest H. Fontaine, Jr., trustee, offered to sell their respective interests to defendant corporation at a price of $100.00 per acre and so informed plaintiffs. Thereafter, during February, 1946, Ben Johnson, then president of defendant corporation, came to New York and offered on behalf of defendant corporation to sign two agreements with plantiffs, one at a price of $75.00 per acre which could be shown to the other co-owners, and a second at a higher price per acre which would be a private agreement between plaintiffs and defendant corporation. Plaintiffs refused to consider this offer. It was thus apparent to plaintiffs that defendant corporation desired to acquire all outstanding interests in said property and plaintiffs believed that it would do so prior to July 1, 1950, at a price or prices in excess of $75.00 per acre.

On or about April 4, 1946, defendant corporation prepared and sent to plaintiffs for their signature the written agreement (Exhibit A) which was signed by both parties as alleged in Paragraph V of this amended complaint.

During July, 1951, plaintiffs learned from an inspection of the official records of Tuolumne County, California, that defendant corporation had agreed prior to July 1, 1950, with all of the co-owners of said lands other than John F. Ducey for the acquisition by defendant corporation of all of their respective interests in all of said lands and plaintiffs are informed and believe and on such information

and belief allege that said interests were so acquired at a price or prices in excess of $75.00 per acre.

The contingency of the purchase by defendant corporation of the fractional interest of John F. Ducey in a part of but less than all of said lands was not discussed during the negotiations between plaintiffs and defendant corporation, but the plaintiffs at all times prior to, and at the time of executing said agreement understood and believed and defendant corporation at all said times knew or suspected that plaintiffs under the terms of said agreement understood and believed that plaintiffs would receive the difference between $75.00 per acre and any higher price per acre which might be agreed upon between defendant corporation and John F. Ducey at any time prior to July 1, 1950.

Wherefore, plaintiffs pray judgment against the defendant corporation as follows:

1. That the court declare that plaintiffs are entitled, under the terms of the agreement (Exhibit A) to receive from the defendant corporation such amount or amounts of money as may be found necessary to make up the difference between the price of Seventy-five Dollars ($75.00) per acre at which defendant corporation acquired plaintiffs' interest, and the higher price per acre at which defendant corporation acquired the interest of said John F. Ducey, in certain parcels of said lands, together with interest thereon from the time the same should have been paid, in accordance with the terms set

forth in subparagraphs (a) and (b) of paragraph 10-(A) of said agreement.

2. That if the language of the contract does not mean what plaintiffs claim it means, as stated in Paragraph X of this complaint, that by decree of this court the aforesaid agreement be reformed to conform with the actual agreement of the parties as alleged in Paragraph X of this complaint by the addition of the words "any of" after the word "in" and preceding the words "the property listed" in the third line of paragraph 10-(A) of said agreement.

3. That the court decree that under the said agreement so reformed defendant corporation owes plaintiffs such amount or amounts of money as may be found necessary to make up the difference between the price of Seventy-five Dollars ($75.00) per acre at which defendant corporation acquired plaintiffs' interest, and the higher price per acre at which defendant corporation acquired the interest of said John F. Ducey, in a part of said lands, together with interest thereon from the time the same should have been paid in accordance with subparagraphs (a) and (b) of paragraph 10-(A) of said agreement.

4. For interest, costs of suit, and such other and further relief as to the court may seem proper.

.....,
Attorney for Plaintiffs.

Lodged November 23, 1951.
[Endorsed]: Filed January 4, 1952.

[Title of District Court and Cause.]

MOTION TO DISMISS
AMENDED COMPLAINT

Defendant Pickering Lumber Corporation, a corporation, moves the Court to dismiss the action as to said defendant because the amended complaint fails to state a claim against said defendant upon which relief can be granted.

/s/ JOHN F. DOWNEY,

/s/ RALPH R. MARTIG,

DOWNEY, BRAND,
SEYMOUR & ROHWER,

Attorneys for Defendant Pickering Lumber Corporation, a Corporation.

[Endorsed]: Filed January 25, 1952.

[Title of District Court and Cause.]

ORDER

I believe that a ruling upon the motion to dismiss should be deferred until the trial. This is permissible under Rule 12 (d) of the Rules of Civil Procedure. c.f. Montgomery Ward & Co. vs. Schumacher, 3 F.R.D. 368; Bowles vs. Bissinger, 3 F.R.D. 494. It is so ordered.

March 26th, 1952.

/s/ DAL M. LEMMON,
United States District Judge.

[Endorsed]: Filed March 26, 1952.

[Title of District Court and Cause.]

ANSWER

Comes now defendant Pickering Lumber Corporation, a Delaware corporation, and for its answer to the Amended Complaint states:

First Defense

The Amended Complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

1. Defendant admits the allegations contained in Paragraph I of the Amended Complaint.

2. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation of Paragraph II of the Amended Complaint that plaintiffs James V. McConnell and Margot Murphy McConnell, at all times therein mentioned, were husband and wife. Defendant denies each and every other allegation contained in Paragraph II of the Amended Complaint.

3. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph III of the Amended Complaint.

4. Defendant denies that its principal offices and place of business are in Kansas City, Missouri, and denies that D. H. Steinmetz, Standard, California, is designated as its agent in California for the service of process, all as alleged in Paragraph IV of the Amended Complaint. Defendant admits all other allegations contained in Paragraph IV of the Amended Complaint.

5. Defendant admits that plaintiffs and defendant entered into a written agreement, in the above-entitled District and Division, on the 10th day of April, 1946, and that a copy of said agreement, with its attached Schedule "A," is annexed to the Amended Complaint, marked "Exhibit A" and by reference incorporated therein. Defendant denies each and every other allegation contained in Paragraph V of the Amended Complaint.

6. Defendant admits the allegation contained in Paragraph VI of the Amended Complaint.

7. Defendant admits that on December 9, 1947, it contracted with John F. Ducey for the purchase of his 494.8/1360 fractional interest in 1599.22 acres of timberland in Tuolumne County, California, comprising a part only of the 6171.68 acres described in Schedule "A" of the aforesaid agreement between defendant and plaintiffs. John F. Ducey's 494.8/1360 fractional interest in the remaining 4572.46 acres of the 6171.68 acres described in said Schedule "A" is now owned by said John F. Ducey and has never been acquired by defendant. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments that plaintiffs have been unable to ascertain the exact price per acre paid by defendant corporation to John F. Ducey, and that plaintiffs believe said price to be approximately $150.00 per acre. Defendant denies each and every other allegation contained in Paragraph VII of the Amended Complaint.

8. Defendant admits it has never given plain-

tiffs notice under the provisions of subparagraph (B) of paragraph 10 of the aforesaid agreement and admits it has never paid any additional amount or amounts to the Escrow Agent for the account of plaintiffs under the provisions of subparagraphs (a) and (b) of paragraph 10-(A) of said agreement. Defendant denies that it is or at any time was required under the provisions of subparagraph (B) of paragraph 10 of said agreement to give any type of notice whatsoever to plaintiffs; and defendant denies that it is or at any time was obligated under the provisions of subparagraphs (a) and (b) of paragraph 10-(A) of said agreement to pay any sums or amounts of money whatsoever to or for the account of plaintiffs. Defendant denies each and every other allegation contained in Paragraph VIII of the Amended Complaint.

9. Defendant is not and never has been obligated under the terms of paragraph 10 of the said agreement with plaintiffs, or otherwise, to pay to or for the account of plaintiffs any additional amount or amounts of money whatsoever by reason of the purchase by defendant of John F. Ducey's 494.-8/1360 fractional interest in 1599.22 acres of the 6171.68 acres described in Schedule "A" of the aforesaid agreement. Defendant denies each and every other allegation contained in Paragraph IX of the Amended Complaint.

10. Defendant denies each and every allegation contained in Paragraph X of the Amended Complaint.

11. Defendant admits that it negotiated for the purchase of the undivided interests in the land described in Schedule "A" attached to said agreement and admits that it negotiated with plaintiffs for the purchase of plaintiffs' undivided interest in said land. Defendant denies each and every other allegation contained in Paragraph XI of the Amended Complaint.

Third Defense

Any claim for relief stated in Paragraph XI of the Amended Complaint did not accrue within three (3) years next before the commencement of this action and is therefore barred by the limitations provisions of Section 338-4 of the California Code of Civil Procedure.

Wherefore, having fully answered, defendant prays that the Court deny the relief sought by plaintiffs; discharge defendant from all liability in the premises and award its costs; and that plaintiffs take naught by their action.

Dated: April 17, 1952.

/s/ JOHN F. DOWNEY,
/s/ RALPH R. MARTIG,
DOWNEY, BRAND,
SEYMOUR & ROHWER,
Attorneys for Defendant Pickering Lumber Corporation, a Corporation.

Receipt of copy acknowledged.

[Endorsed]: Filed April 19, 1952.

[Title of District Court and Cause.]

DEMAND FOR JURY TRIAL

To Defendant Pickering Lumber Corporation, a corporation, and to John F. Downey, Ralph R. Martig and Downey, Brand, Seymour & Rohwer, its attorneys:

You will please take notice that the plaintiffs in the above-entitled cause demand a jury, and that the claim for relief predicated upon the contract without reformation thereof be tried by a jury, and plaintiffs further demand that all issues of fact arising upon the claim for relief predicated upon reformation of said contract be tried by a jury.

/s/ HERBERT BARTHOLOMEW,

/s/ PEMBROKE GOCHNAUER,
Attorneys for Plaintiffs.

[Endorsed]: Filed April 25, 1952.

[Title of District Court and Cause.]

MOTION TO DISPENSE WITH JURY TRIAL ON REFORMATION ISSUES

Defendant Pickering Lumber Corporation, a corporation, moves the Court to dispense with a jury trial on the issues arising upon the claim for relief predicated upon reformation of contract as set forth in the complaint in the above action. This

motion is made pursuant to Rule 39(a)(2) of the Federal Rules of Civil Procedure.

Dated: May 1, 1952.

/s/ JOHN F. DOWNEY,

/s/ RALPH R. MARTIG.

[Endorsed]: Filed May 1, 1952.

[Title of District Court and Cause.]

MEMORANDUM AND ORDER

This case affords a classical example of improvident plaintiffs struggling to enlist the aid of a court to extricate them from the web of their own imprudence.

The unsure nature of the plaintiffs' position is indicated by their varying and inconsistent contentions at various times:

(1) That the contract as drawn is clear and unambiguous, and should be construed in the plaintiffs' favor;

(2) If the contract isn't clear and unambiguous, it contains an "extrinsic" or "latent" "ambiguity," and parol evidence should be admitted to show what the parties meant by what they said;

(3) That if it isn't clear and unambiguous, it was entered into as the result of a mutual mistake, and should be reformed; and

(4) That the mistake, if any, wasn't mutual after all, but unilateral on the plaintiffs' own part—but even if so, the contract should be reformed in their favor, anyway!

1. The Original Complaint

On August 23, 1951, the plaintiffs, who are husband and wife, filed their original complaint. They alleged that they are citizens of the State of New York, and that the defendant is incorporated under the laws of Delaware. The complaint contained the following salient averments:

On April 10, 1946, the plaintiffs were the owners of an undivided fractional interest in lands in Tuolumne County, California, known as the McArthur and Ducey lands, together with the timber thereon.

The Pickering Lumber Corporation, the defendant, organized under the laws of Delaware, on April 10, 1946, entered into a written agreement with the plaintiffs concerning the acquisition by the defendant of the plaintiffs' above-mentioned undivided interest.

There are listed three "Doe" defendants, whose roles in this case have remained a mystery to the time of this writing. The Pickering Corporation will hereinafter be referred to as "the defendant."

The McArthur and Ducey lands consist of 154 parcels of about 40 acres each, and aggregate 6,172.60 acres. John F. Ducey, of Detroit, Michigan, at the time of the negotiation of the above agreement held an undivided interest of 494.8/1360 in that tract, or the equivalent of approximately 2,245.402 acres if divided. Margot Murphy McCon-

nell, one of the plaintiffs, held an undivided interest of 248.2/1360, or approximately 1,126.33 acres if divided, in the same McArthur and Ducey lands. There were five other co-owners, each likewise holding an "undivided fractional interest." The defendant was one of the co-owners, with a share of 272/1360, or 20 per cent; or about 1,234.336 acres if divided.

Section 10 of the above agreement between the plaintiffs and the defendant reads as follows:

"10-(A) Should Purchaser (defendant) at any time prior to July 1, 1950, acquire the 494.8/1360 fractional interest of John F. Ducey in the property listed in Schedule A from him * * * or at a partition sale of all the property * * * at a price higher than that provided herein for Sellers' (plaintiffs') interest, then Purchaser and Sellers hereby agree that the price provided in this contract for the Sellers' interest shall forthwith be adjusted upward by the amount necessary to make up the difference * * *

"(B) The Purchaser further agrees with the Seller (sic) that, in the event it should purchase the said John F. Ducey interest at any time on or before July 1, 1950, that (sic) it will, within fifteen (15) days after making said purchase, mail to the address of the Seller (sic), notice of said purchase and the terms and conditions of same."

In February, 1949, the plaintiffs discovered that on or about December 9, 1947, the defendant had acquired Ducey's 494.8/1360 interest to certain parcels of the lands, which portions, the plaintiffs have

since learned, amounted to 40 parcels aggregating 1,599.22 acres. The price was greatly in excess of $75 per acre, which had been theretofore paid to the plaintiffs for their fractional interest in the lands. The plaintiffs believe that the price paid by the defendant to Ducey was approximately $150 per acre.

The defendant has never notified the plaintiffs of its purchase of Ducey's interest, and has not paid any additional amount to the Escrow Agent named in the agreement, for the account of the plaintiffs.

The plaintiffs are informed that the defendant contends that it does not owe them any money under the agreement, on the ground that it did not acquire Ducey's fractional interest in all 154 parcels of the land in question, but only in 40 parcels thereof.

Such an interpretation of the contract is opposed by the plaintiffs, but they allege that if the agreement is indeed susceptible to such a construction, then the language of Paragraph 10-(A), supra, does not truly express the intention of the parties at the time of the execution of the contract. In this regard the plaintiffs allege:

Prior to the execution of the agreement, Ben Johnson, at that time president of the defendant, informed the plaintiffs that the defendant wanted to purchase Ducey's fractional interest in all the lands, and that the defendant would never consider the purchase of Ducey's fractional interest in less than all the land. At no time thereafter, during the negotiations leading up to the execution of the

agreement, did the parties consider or discuss the purchase by the defendant of the fractional interest of Ducey or of any other co-owner in only a part of the lands, or the price to be paid to the plaintiffs in the event the defendant should thereafter acquire Ducey's interest in only a part of the tract.

The defendant prepared the written agreement, including paragraph 10-(A), and the plaintiffs signed it in the belief that it truly expressed the intention of the parties. The plaintiffs therefore allege that the contract was executed under a "mutual" mistake of each party as to the meaning of paragraph 10 in the event that the defendant should acquire, on or before July 1, 1950, Ducey's fractional interest in less than all of the lands in question.

In the event the agreement was not executed under a mutual mistake, then it was entered into under a mistake of the plaintiffs that the defendant at the time of the execution thereof knew or suspected. The plaintiffs were unwilling to dispose of their fractional interest and to place in escrow deeds thereto for future delivery from April 10, 1946, to July 1, 1950, at $75 per acre, unless they should receive as additional consideration therefor the difference in price between $75 and any higher price per acre provided for in any agreement between the defendant and Ducey by which the defendant should acquire Ducey's interest in all or any part of the lands. At the time of the execution of the agreement the defendant knew or suspected

that the "plaintiffs would not execute said agreement if the language of paragraph 10-(A) thereof were susceptible of the interpretation now placed upon it and now relied upon, by defendant corporation, namely, that paragraph 10 thereof should not apply in the event defendant corporation, at any time prior to July 1, 1950, should acquire the fractional interest of said John F. Ducey in a part of, but less than all of, said lands."

The prayer is that the Court declare the plaintiffs are entitled, "under the terms of the agreement * * *, to receive from the defendant * * * such amount * * * of money as may be found necessary to make up the difference between * * * $75 per acre at which defendant corporation acquired plaintiffs' interest, and the higher price per acre at which defendant corporation acquired the interest of * * * Ducey in certain parcels of said lands," etc.

The plaintiffs also ask that if the contract "does not mean what plaintiffs claim it means," the contract be reformed by the Court to conform "with the actual agreement of the parties * * * by the addition of the words 'any of' after the word 'in' and preceding the words 'the property listed' in the third line of paragraph 10-(A) * * *"

Finally, the plaintiffs pray that under the agreement so reformed the Court decree that the defendant owes the plaintiffs the difference between the price of $75 per acre and the higher price per acre at which the defendant acquired Ducey's interest in a part of the lands, together with interest, etc.

2. The Original Complaint Is Dismissed

On October 9, 1951, the defendant corporation filed a motion to dismiss the action on the ground that the complaint failed to state a claim upon which relief could be granted.

On Novmber 7, 1951, the Court made an order reading in part as follows:

> "I do not find an ambiguity in the contract. It is therefore not subject to the interpretation which plaintiffs would place upon it. The allegations of the complaint do not set forth an agreement by the parties other than the writing herein to which it could be reformed. The averments are insufficient to permit reformation on the ground of mistake. It follows that the complaint should be dismissed.
>
> "Defendant's motion to dismiss is granted and the complaint herein is dismissed with leave to plaintiffs to file within fifteen days from the date hereof an amended complaint setting forth sufficient allegations to present the question of the propriety of reforming the agreement herein."

3. The Motion to Vacate the Order

On November 23, 1951, the plaintiffs moved the Court to vacate its order of November 7, 1951, as being contrary to law, and asked for leave to file an amended complaint.

On January 3, 1952, the Court granted the plaintiffs' motion for leave to file an amended complaint, and set aside the submission of the plaintiffs' motion to vacate the order of the Court of November

7, 1951. The motion was ordered to be resubmitted upon the submission of any motion attacking the amended complaint.

4. The Amended Complaint

On January 4, 1952, the plaintiffs filed an amended complaint. As they point out in their brief, the amended complaint differs from the original one in that it omits a claim for relief by way of reformation of the contract based upon the mutual mistake of the parties. Relief by way of reformation is sought, as an alternative to a claim for relief on the contract itself, bottomed upon the plaintiffs' mistake, which it is alleged was known or suspected by the defendant at the time the contract was executed. The plaintiffs' claim for relief on the contract as it stands has been left unchanged. The prayers of the two complaints are identical.

In their brief, the plaintiffs claim that the allegations of the original complaint regarding the plaintiffs' unilateral mistake "have been expanded and particularized." This is in professed accordance with Rule 9(b) of the Federal Rules of Civil Procedure. Summarized, the allegations of the amended complaint as to the plaintiffs' mistake are as follows:

The plaintiffs executed the agreement believing that Section 10-(A) meant that they should receive as the price of their interest an amount equal to the difference between $75 per acre and any higher price provided for in any agreement between the defendant and Ducey, for the sale of the latter's interest in all or any of the lands.

Soon after the defendant acquired, in July, 1944, its twenty per cent interest, it opened negotiations with the owners of all other outstanding interests in the lands, for the purchase of such interests. It was necessary for the defendant to acquire all outstanding interests in any parcel of the land before it could cut any timber thereon. The negotiations between the defendant and its co-owners were conducted in large part between the defendant and the plaintiffs. All of the said co-owners except Ducey were willing to sell if a fair price could be had.

In March, 1945, plaintiff Margot McConnell met with all her co-owners in Detroit. It was then agreed among them that all were willing to sell at that time at a price of $75 per acre. This was made known to the defendant, which, in June, 1945, prepared, signed, and sent to its co-owners a proposed agreement for the purchase of all their interests at that price. The proposal contained substantially the same provisions as the contract now being considered, except that it did not have any pricing clause, such as Paragraph 10, supra.

Because Ducey refused to sign it, that proposed agreement was not accepted by the plaintiffs or any of the other co-owners. Commencing about in November, 1945, the defendant began negotiations with the plaintiffs for the purchase of their interest alone, and informed them that if the defendant could not acquire the interests of the other co-owners, the acquisition of the plaintiffs' interest would improve the defendant's position in the event that a partition suit should become necessary.

From the inception of the defendant's efforts to acquire the plaintiff's interest separately from those of the other co-owners, the plaintiffs refused to sell at a price of $75 per acre. They informed the defendant of such unwillingness, and declared that they must receive "price protection" against the acquisition by the defendant, prior to July 1, 1950, of any other interest therein at a higher price. Later, it was orally agreed between them that any such price protection clause that might finally be agreed upon would refer only to any higher price to be paid to Ducey, in view of the size of his fractional interest and his past unwillingness to sell.

During February, 1946, Ducey and three other co-owners offered to sell their respective interests to the defendant for $100 per acre, and so informed the plaintiffs. Later that month, Ben Johnson, then president of the defendant, went to New York and offered, on behalf of the corporation, to sign two agreements with the plaintiffs, one at a price of $75 per acre, which could be shown to the other co-owners, and a second at a higher price, which would be a "private agreement" between the plaintiffs and the defendant. The plaintiffs refused to consider this offer.

It was thus apparent to the plaintiffs that the defendant desired to acquire all outstanding interests in the property, and they believed that it would do so before July 1, 1950, at a price in excess of $75 per acre.

On or about April 4, 1946, the defendant prepared and sent to the plaintiffs for their signature

the agreement that constitutes Exhibit A, supra. This was signed by both parties.

During July, 1951, the plaintiffs learned from an inspection of the official records of Tuolumne County, that the defendant had agreed, prior to July 1, 1950, with all the co-owners other than Ducey for the defendant's acquisition of all of their respective interests in the lands. Such acquisition was effected at prices higher than $75 per acre, according to the plaintiffs' belief.

The contingency of the defendant's purchase of Ducey's fractional interest in less than all of the lands was not discussed during the negotiations between the plaintiffs and the defendant, but the plaintiffs at all times prior to and at the time of executing the agreement believed—and the defendant "knew or suspected" that the plaintiffs under the terms of the agreement so understood and believed—that they would receive the difference between $75 per acre and any higher price that might be agreed upon between the defendant and Ducey at any time prior to July 1, 1950.

5. The Motion to Dismiss the Amended Complaint

On January 25, 1952, the defendant filed a motion to dismiss the amended complaint for failure to state a claim upon which relief can be granted.

On March 26, 1952, the Court made the following order:

> "I believe that a ruling upon the motion to dismiss should be deferred until the trial. This is permissible under Rule 12(d) of the Rules

of Civil Procedure. Cf. Montgomery Ward & Co. vs. Schumacher, 3 F.R.D. 368; Bowles vs. Bissinger, 3 F.R.D. 494. It is so ordered."

6. The Answer

The time to answer having been extended by stipulation, on April 19, 1952, the defendant filed its answer, consisting of three "defenses."

The first defense asserts that the amended complaint fails to state a claim against the defendant upon which relief can be granted.

In its second defense, the Company denies that its principal offices are in Kansas City, Missouri, and that D. H. Steinmetz, of Standard, California, is designated as its agent for the service of process.

While admitting the agreement of April 10, 1946, the defendant denies all the allegations of the amended complaint relating to the ownership of the various undivided interests in the land in question—including its own share in the tract.

The answer admits that on December 9, 1947, the defendant contracted with Ducey for the purchase of his 494.8/1360 fractional interest in 1599.22 acres of timber land in Tuolumne County. It is alleged that Ducey's 494.8/1360 interest in the remaining 4572.46 acres of the 6171.68 acres of the tract is still owned by Ducey. The defendant denies that it owes the plaintiffs the difference between $75 per acre and the higher price alleged by the plaintiffs to have been paid to Ducey by the defendant.

It is admitted that the defendant has never given

the plaintiffs notice under the provisions of subparagraph B of paragraph 10 of the contract, supra, and that it has never paid any additional amounts to the Escrow Agent for the account of plaintiffs, under the provisions of the contract. The defendant denies that it has been obligated to do so under those provisions. It likewise denies that it is obligated to pay the plaintiffs any sum whatever by reason of its purchase of Ducey's fractional interest in 1599.22 acres. The answer challenges the plaintiffs' interpretation of Paragraph 10 of the contract, supra.

Regarding the plaintiffs' alternative claim for relief based upon their own alleged mistake, which has already been fully set forth herein, the defendant merely admits that it negotiated for the purchase of the undivided interests in the land described in the schedule attached to the agreement, including the plaintiffs' undivided interest therein. Every other allegation regarding the unilateral mistake is denied.

As its third defense, the Company asserts that any claim for relief due to the plaintiffs' alleged mistake did not accrue within three years before the commencement of this action, and is therefore barred by the limitations provisions of Section 338-4 of the California Code of Civil Procedure.

7. The Motions Relating to a Jury Trial

On April 25, 1952, the plaintiffs filed a demand for a jury trial, on the claim for relief predicated upon the contract either with or without reformation.

On May 1, 1952, the defendant filed a motion to dispense with a jury trial on the reformation issue. The motion was made pursuant to Rule 39(a)(2) of the Federal Rules of Civil Procedure.

8. The Planitiffs Are Not Entitled to Relief on the Contract as It Stands.

It is fundamental law that, when a copy of a contract is attached to a pleading, the contract itself, and not what the pleader alleges it to be, is determinative. This rule applies even on a motion to dismiss.

In Foshee vs. Daoust Construction Co., 7 Cir., 185 F. 2d 23, 25 (1950), the Court pointed out that "where the allegations of a pleading are inconsistent with the terms of a written contract attached as an exhibit, the terms of the latter, fairly construed, must prevail over the averments differing therefrom. (Cases cited)"[1]

We must turn, then, to the contract itself in order to ascertain the intention of the parties. A written contract "supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instru-

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[1]See also Pelelas vs. Caterpillar Tractor Co., 7 Cir., 113 F. 2d 629, 631 (1940), certiorari denied, 311 U.S. 700 (1940); Sinclair Refining Co. vs. Stevens, 8 Cir., 123 F. 2d 186, 189 (1941), certiorari denied, 315 U. S. 804 (1942); Zeligson vs. Hartman-Blair, Inc., 10 Cir., 126 F. 2d 595, 597 (1942); Eaves vs. Timm Aircraft Corp., 107 C.A. 2d 367, 370 (1951), petition for a hearing by the State Supreme Court denied (1952).

ment." Section 1625 of the California Civil Code.[2]

The plaintiffs contend, however, that the contract contains an "extrinsic ambiguity," within the ambit of Section 1856 of the California Code of Civil Procedure. That section reads as follows:

> "An agreement reduced to writing deemed the whole. When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases:
>
> "1. Where a mistake or imperfection of the writing is put in issue by the pleadings;
>
> "2. Where the validity of the agreement is the fact in dispute.
>
> "But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in section eighteen hundred and sixty, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term agreement includes deeds and wills, as well as contracts between parties." (Emphasis supplied.)

In the instant case, however, there is no ambiguity, either extrinsic or intrinsic, in the contract.

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[2]See also United Iron Works vs. Outer Harbor Dock and Wharf Co., 168 Cal. 81, 84-85 (1914); Harding vs. Robinson, 175 Cal. 534, 537 (1917).

If there was any misconception or misapprehension regarding the agreement, it existed in the minds of the plaintiffs alone. The mistake, if any, was purely subjective with them, and, as we shall see presently, they are not in a posiiton to take advantage of it.

After quoting Section 1856, supra, the Supreme Court of California, in Barnhart Aircraft, Inc., vs. Preston, 212 Cal. 19, 21-22, 23-24 (1931), referred with approval to the following language used by Jones in his Commentaries on Evidence, volume 3, section 454:

> "' * * * Ambiguity in a written contract, calling for construction, may arise as well from words plain in themselves but uncertain when applied to the subject matter of the contract, as from words which are uncertain in their literal sense * * * Such an ambiguity never arises out of what was not written at all, but only out of what was written so blindly and imperfectly that its meaning is doubtful.
>
> "'It must be borne in mind that although declarations of the parties may in some cases be received to explain contracts or words of doubtful meaning, yet no other words can be added to or substituted for those of the writing. The courts are not at liberty to speculate as to the general intention of the parties, but are charged with the duty of ascertaining the meaning of the written language.'" (Emphasis supplied.)

Applying the foregoing language to the instant contract, there is absolutely no warrant for asserting that the words "fractional interest of John F. Ducey in the property" were "written blindly and imperfectly" or that their meaning is "doubtful"; and since "no other words can be added to or substituted for those of the writing," we cannot read "in the property" to mean "in any of the property."

Similarly, in Eastern-Columbia vs. System Auto Parks, Inc., 100 C.A. 2d 541, 545 (1950), it was said.

> "If the language of the instrument is clear and explicit the intention of the parties must be ascertained from the writing alone. Parol evidence is admissible only where the language used is doubtful, uncertain or ambiguous and only then in cases where the doubt appears upon the face of the contract. (Cases cited.)"[3]

Generally speaking, we may say that "the property," as used in the present contract, means "all the property." A closely similar question was presented to the Court in Russell vs. Stillwell, 106 Cal. App. 88, 92 (1930):

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[3]See also Betts vs. Orton, 34 Cal. App. 397, 400 (1917); Courtright vs. Dimmick, 22 C.A. (2d) 68, 71 (1937), petition to have the cause heard in the California Supreme Court denied (1937); Miranda vs. Miranda, 81 C.A. 2d 61, 66-67 (1947), petition for a hearing by the California Supreme Court denied (1947).

> "We can see but one construction that can be placed upon the words in the added clause 'the completion of the plans,' and that is all plans before mentioned in the contract—not merely preliminary plans. The words themselves require no explanation. If they did it could be found in the contract itself. In the absence of fraud, where the parties have reduced to writing what appears to be a complete and certain agreement, parol evidence will not be permitted for the purpose of varying the written contract."

Quoting a salutory admonition to be found in the California statutes themselves, our Court of Appeals, in Black vs. Richfield Oil Corporation, 146 F. 2d 801, 804 (1945), certiorari denied, 325 U.S. 867 (1945), said:

> "The California law is admittedly controlling. A statute of that state (section 1858, Cal. Code Civ. Proc.) provides that, in the construction of an instrument, 'the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted.' The local decisions, like those of the courts elsewhere, are in harmony with the elementary principle declared by the statute."

One of the authorities relied upon by the plaintiffs is Universal Sales Corporation, Ltd., vs. California Press Manufacturing Company, 20 C. (2d)

751, 776 (1942). The plaintiffs quote the following excerpt from what they term the "separate concurring opinion" of Mr. Justice Traynor:

> "Words are used in an endless variety of contexts. Their meaning is not subsequently attached by the reader but is formulated by the writer and can only be found by interpretation in the light of all the circumstances that reveal the sense in which the writer used the words. The exclusion of parol evidence regarding such circumstances merely because the words do not appear ambiguous to the reader can easily lead to the attribution to a written instrument of a meaning that was never intended."

The plaintiffs have omitted the two opening sentences of Mr. Justice Traynor's opinion, immediately preceding the extract quoted supra. Those two sentences definitely establish that the justice dissented from the majority opinion in the very respect that is crucial here:

> "I concur in the judgment. I do not agree with the premise implicit in the majority opinion that parol evidence as to the meaning of the contract was admissible only because the contract is ambiguous on its face."

This Court believes that the rule was correctly stated by Mr. Associate Justice Curtis, who gave the majority opinion:

> "The fundamental canon of construction which is applicable to contracts generally is the ascertainment of the intention of the parties

(Civ. Code, sec. 1636), and in accordance with section 1638 of the Civil Code, the language of the agreement, if clear and explicit and not conducive to an absurd result, must govern its interpretation." (Page 760.)

To hold that the meaning of words "is not subsequently attached to them by the reader but is formulated by the writer" is too reminiscent of Humpty Dumpty's oft-quoted theory of semantics.[4]

9. The Plaintiffs Have Not Made a Showing That Entitles Them to a Reformation of the Contract.

Rule 9(b) of the Federal Rules of Civil Procedure reads in part as follows:

> "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity * * *"[5]

There has been given hereinabove a somewhat full summary of the plaintiffs' so-called "expanded and particularized" allegations purporting to deal with their unilateral mistake.

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[4]" 'When I use a word,' Humpty Dumpty said in a rather scornful tone, 'it means just what I choose it to mean—neither more nor less.'

" 'The question is,' said Alice, 'whether you can make words mean so many different things.'

" 'The question is,' said Humpty Dumpty, 'which is to be master—that's all.' "

Lewis Carroll: "Through the Looking Glass and What Alice Found There," chapter vi, page 234 (M. A. Donohue & Co., Chicago and New York).

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[5]See also Auerbach vs. Healy, 174 Cal. 60, 63 (1916).

Taking these allegations by their four corners, however, we find that while they are replete with details, the details are not pertinent to the question of the plaintiffs' asserted unilateral "mistake."

The most relevant statement in that connection is to be found in the very first paragraph of the plaintiffs' explanation. But the allegation in question, already quoted in full substance herein, is merely one of an ultimate fact; namely, that "Plaintiffs executed said agreement under the understanding and belief that Section 10-(A) thereof meant plaintiffs should receive as the price of their interest * * * an amount equal to the difference between $75 per acre and any higher price," etc.

There is absolutely nothing in the succeeding paragraphs that in the slightest degree bears upon the question of the execution of the agreement "by plaintiffs under a mistake on their part as to the meaning and effect thereof, which mistake was known or suspected by defendants at the time of the execution thereof."

On the contrary, the plaintiffs allege that "The contingency of the purchase of the fractional interest of John F. Ducey in a part of but less than all of said lands was not discussed during the negotiations between plaintiffs and defendant corporation."

Indeed, the very closing words of the plaintiffs' "expended and particularized allegations" regarding their alleged mistake fail to set forth that even they understood the contract to mean that if Ducey sold less than all his interest in the land to the defendant they would receive the differential be-

tween $75 per acre and the higher price paid to Ducey:

> " * * * the plaintiffs at all times prior to, and at the time of executing said agreement understood and believed and defendant corporation at all said times knew or suspected that plaintiffs under the terms of said agreement understood and believed that plaintiffs would receive the difference between $75.00 per acre and any higher price per acre which might be agreed upon between defendant corporation and John F. Ducey at any time prior to July 1, 1950."

At that point in the plaintiffs' recital, bringing to a culmination the lengthy narrative regarding the negotiations, one would expect the plaintiffs to make strong mention of their alleged understanding that the agreement covered Ducey's sale to the defendant of his fractional interest in less than all the lands. Yet as to that crucial feature of the case, the plaintiffs' peroration contains no specific word. "O most lame and impotent conclusion!"

From this eloquent lack of particularity on so vital an issue, the Court is forced to the conviction that there are no facts which the plaintiffs can allege regarding even their own asserted subjective, unilateral misunderstanding of the meaning of the agreement. Their hindsight seems to be vastly superior to their foresight.

Section 3399 of the California Civil Code lays down the conditions under which a contract may be

revised by the courts on the ground of mistake:

> "When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised, on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value."

In California, it is well settled that, before a contract can be reformed on the ground of fraud or mistake, the plaintiff must plead and prove a definite agreement that pre-existed the instrument sought to be corrected.

In Auerbach vs. Healy, supra, 174 Cal. at pages 62-63, the Supreme Court of California said:

> "The rules of pleading in actions for the reformation of contracts are well established, and should be familiar. The complaint should allege 'what the real agreement was, what the agreement reduced to writing was, and where the writing fails to embody the real agreement.' 34 Cyc. 972.) If the complaint seeks the correction of a description of land, 'the pleading must describe the premises so as to render certain the location and boundaries.' (34 Cyc. 973.)"

Counsel for the plaintiffs contend, however, that "as to a mistake of one party which the other at the time knew or suspected" they "have been unable to find any California cases holding that it is necessary to allege under these circumstances that

the parties did come to an agreement, and setting forth that agreement."

There is, however, precisely such a case, decided recently by the Supreme Court of California and citing numerous authorities: Bailard vs. Marden, 36 C. 2d 703, 708-709 (1951). There the plaintiffs alleged both a mutual mistake and their own unilateral mistake, as is made clear on page 704 of the opinion.

With such a situation before it, the Court said:

> "The purpose of reformation is to effectuate the common intention of both parties which was incorrectly reduced to writing. To obtain the benefit of this statute (Section 3399), it is necessary that the parties shall have had a complete mutual understanding of all the essential terms of their bargain; if no agreement was reached, there would be no standard to which the writing could be reformed.
>
> "Otherwise stated, '(I)nasmuch as the relief sought in reforming a written instrument is to make it conform to the real agreement or intention of the parties, a definite intention or agreement on which the minds of the parties had met must have pre-existed the instrument in question.' (Authorities cited.) Our statute adopts the principle of law in terms of a single intention which is entertained by both of the parties. 'Courts of equity have no power to make new contracts for the parties, * * * (N) or can they reform an instrument according to the terms in which one of the parties understood it, unless it appears that the other

party also had the same understanding. (22 Cal. Jur. section 2, p. 710). If this were not the rule, the purpose of reformation would be thwarted."

Nowhere in the amended complaint now before this Court is there any suggestion of any "pre-existing agreement" to which the sought-for re-formed instrument should conform. The verbose statement in the amended complaint contains no intimation that the plaintiffs envisaged any sale by Ducey to the defendant of his undivided fractional interest in only a part of the lands in question. On the contrary, the amended complaint specifically negatives such a suggestion, for, as we have seen, it alleges that the purchase by the defendant of Ducey's interest in "less than all" of the lands "was not discussed."

10. The Amended Complaint Shows on Its Face That the Action for Reformation Is Barred by the Statute of Limitations.

Under Rule 9(f) of the Federal Rules of Civil Procedure, "For the purpose of testing the sufficiency of a pleading, averments of time * * * are material * * *" Accordingly, where a complaint shows on its face that the action is barred by a statute of limitations, the defense can be raised by a motion to dismiss.

A recent case in point, decided by our Court of Appeals, is Suckow Borax Mines Consolidated, Inc., vs. Borax Consolidated, Ltd., 9 Cir., 185 F. 2d 196, 204 (1950), certiorari denied, 340 U.S. 943

(1951), rehearing denied, 341 U.S. 912 (1951). There the Court said:

> " * * * a complaint may properly be dismissed on motion for failure to state a claim when the allegations in the complaint affirmatively show that the complaint is barred by the applicable statute of limitations. This is because Rule 9(f) makes averments of time and place material for the purposes of testing the sufficiency of a complaint. (Many cases cited)"[6]

It is well settled that, where there is no applicable Federal statute of limitations, the statute of the State where the action is brought controls.[7]

Section 338 (4) of the California Code of Civil Procedure provides that "An action for relief on the ground of * * * mistake" must be brought within three years. The subsection further sets forth:

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[6]See also Gossard vs. Gossard, 10 Cir., 149 F 2d 111, 113 (1945); Brictson vs. Woodrough, 8 Cir., 164 F 2d 107, 110-111 (1947), certiorari denied, 334 U.S. 849 (1948); 2 Moore's Federal Practice, 2d ed., Section 9.07, page 1920; 1 Barron and Holtzoff's Federal Practice and Procedure, Rules ed., Section 307, page 556.

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[7]Johnson vs. Greene, DC Cal., 14 F Supp. 945, 947 (1936), affirmed, 9 Cir., 88 F 2d 683 (1937); Latta vs. Western Inv. Co., 9 Cir., 173 F 2d 99, 107 (1949), certiorari denied, 337 U.S. 940 (1949), petition for rehearing denied, 338 U.S. 840 (1949), motion for leave to file a second petition for rehearing denied, 338 U.S. 863 (1949), motion for leave to file petition for rehearing denied, 338 U.S. 889 (1949); Zellmer vs. Acme Brewing Co., 9 Cir., 184 F 2d 940, 942 (1950), 21 ALR 2d 253n. (1952).

> "The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

The amended complaint states that the written agreement between the plaintiffs and the defendant was entered into on April 10, 1946. The original complaint, which, as we have seen, contained an alternative prayer for reformation of the contract, was filed on August 23, 1951, more than five years after the execution of the purchase agreement.

In an effort to escape the application of the statute of limitations, however, the plaintiffs allege in both the original and the amended complaint:

> "During the month of February, 1949, plaintiffs discovered that * * * on or about December 9, 1947, defendant corporation had acquired the 494.8/1360 fractional interest of John F. Ducey," etc.

Although Section 338(4), supra, provides that the statute does not start to run until such time as the mistake or fraud is discovered, it is well established in California, as elsewhere, that the time will begin to run at such time as the plaintiffs could with reasonable diligence have ascertained the facts.[8]

The amended complaint should have contained allegations of facts showing why the alleged mistake, in the exercise of reasonable diligence, was not discovered until a time within the period of

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[8]Shain vs. Sresovich, 104 Cal. 402, 405 (1894); Simpson vs. Dalziel, 135 Cal. 599, 603 (1902).

limitation. In other words, the party seeking to avoid the bar must plead facts excusing the failure to make an earlier discovery of the mistake.

In Bradbury vs. Higginson, 167 Cal. 553, 558 (1914), the Court said:

> "It is true that the answer avers that the defendant did not discover the mistake until August, 1909, which was within three years of the filing of the answer. But a mere averment of ignorance of a fact which a party might with reasonable diligence have discovered is not enough to postpone the running of the statute. (Cases cited). It is necessary for the party seeking to avoid the bar to affirmatively plead facts excusing the failure to make an earlier discovery of the mistake or fraud relied upon."[9]

In California, an action for the reformation of a contract may be barred even though the time for bringing a suit on the contract itself has not yet run. In Bradbury vs. Higginson, supra, 167 Cal. at page 559, the Court, referring to Gardner vs. California Guar., etc., Co., 137 Cal. 71, used the following language:

> "The opinion in the Gardner case contains, further, an expression to the effect that an action for the reformation of a contract is not barred so long as an action on the contract

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[9]See also Montgomery vs. Peterson, 27 Cal. App. 671, 675-676 (1915); Johnson vs. Ware, 58 C.A. 2d 204, 207 (1943); Prentiss vs. McWhirter, 9 Cir., 63 F 2d 712, 713 (1933), 172 ALR 290 (1948).

itself might be brought. If this be the correct rule, we do not consider it applicable to a case like the one before us, where the reformation is not merely incidental to the main relief sought, but is an essential prerequisite to the asking of any relief." (Emphasis supplied.)

The plaintiffs seek to avoid the incidence of the statute of limitations by relying upon the provisions of Paragraph 10-(B), to the effect that the defendant agreed with the plaintiffs that, in the event that it should purchase the Ducey interest it would, within 15 days, notify the plaintiffs to that effect. It is conceded that the defendant did not give the plaintiffs such notice.

The short answer to this contention, of course, is that the defendant did not purchase the Ducey interest in all of the property, but in only a part of it. This feature of the case has already been fully discussed herein, and need not be labored here.

Since the defendant did not purchase the Ducey interest in all of the lands, it was not required to give the plaintiffs the notice specified in Section 10-(B).

A statute of limitations is not a technical device by means of which meritorious claims may be defeated. It is a statute of repose, and is looked upon favorably in Anglo-American jurisprudence. In Wood vs. Carpenter, 101 U.S. 135, 139 (1879), the Court said:

"Statutes of limitation are vital to the welfare of society and are favored in the law.

They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together."[10]

11. Conclusion

Insofar as the claim for relief on the contract as it stands is concerned, it is admitted that the plaintiffs have left their pleadings unchanged. Accordingly, the Court adheres to its ruling of November 7, 1951, to the effect that there is no ambiguity in the contract in its present form.

In their Amended Complaint, the plaintiffs have failed (a) to set out any pre-existing agreement according to which the contract should be reformed, and (b) to give a cogent and persuasive explanation as to how they came to make their alleged "unilateral mistake."

Finally, the Amended Complaint is barred by the three-year statute of limitations, insofar as it relates to the reformation of the contract.

Accordingly, the Amended Complaint is dis-

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[10]See also Shain vs. Sresovich, supra, 104 Cal. at page 406.

missed, and judgment is rendered in favor of the defendant.

Dated: September 3d, 1952.

/s/ DAL M. LEMMON,
United States District Judge.

[Endorsed]: Filed September 3, 1952.

United States District Court for the Northern District of California, Northern Division

Civil Action File No. 6532

JAMES V. McCONNELL and MARGOT MURPHY McCONNELL,

Plaintiffs,

vs.

PICKERING LUMBER CORPORATION, a Corporation, DOE ONE, DOE TWO and DOE THREE,

Defendants.

JUDGMENT OF DISMISSAL

Defendant Pickering Lumber Corporation having filed herein its motion to dismiss plaintiffs' amended complaint on the ground that it fails to state a claim upon which relief can be granted, and having further filed its answer herein whereby as its first defense it asserts that plaintiffs' amended complaint fails to state a claim against the defendant on which relief can be granted; and the Court

having heard arguments and considered briefs on defendant's motion to dismiss, and being fully advised in the premises and having heretofore filed its memorandum and order thereon, now therefore pursuant to said memorandum and order:

It Is Hereby Ordered, Adjudged and Decreed that defendant's motion to dismiss plaintiffs' amended complaint be and the same is hereby granted and plaintiffs' amended complaint is hereby dismissed with prejudice; and judgment is hereby rendered in favor of the defendant and against the plaintiffs, and defendant is awarded its costs of suit herein in the sum of One Hundred Seventy Dollars ($170);

It Is Further Ordered, Adjudged and Decreed that plaintiffs' motion to vacate the order of this Court of November 7, 1951, dismissing plaintiffs' original complaint, as being contrary to the law, be and the same is hereby denied.

Dated: September 16, 1952.

/s/ DAL M. LEMMON,
Judge of the United States
District Court.

[Endorsed]: Filed September 16, 1952.

Affidavit of mailing attached.

Entered September 16, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEAL FROM JUDGMENT OF DISMISSAL

To Pickering Lumber Corporation, a Corporation, and to John F. Downey, Ralph R. Martig, and Downey, Brand, Seymour & Rohwer, Its Attorneys:

You and Each of You will please take notice that James V. McConnell and Margot Murphy McConnell, plaintiffs above named, hereby appeal to the Court of Appeals for the Ninth Circuit from the final Judgment of Dismissal entered in this action on the 16th day of September, 1952.

Dated this 9th day of October, 1952.

/s/ HERBERT BARTHOLOMEW,

/s/ PEMBROKE GOCHNAUER,
Attorneys for Appellants.

[Endorsed]: Filed October 15, 1952.

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANTS INTEND TO RELY

The points upon which the appellants intend to rely upon this appeal are as follows:

1. The District Court erred in dismissing plaintiffs' amended complaint sua sponte after an answer

had been filed, the issues were joined, depositions of the parties had been taken and filed and the case had been regularly set for trial.

2. The District Court erred in vacating, sua sponte, its own Order of March 26, 1952, deferring until the time of trial a ruling on defendant's motion to dismiss the amended complaint.

3. The District Court erred in vacating, sua sponte, its Order of January 3, 1952, resubmitting plaintiffs' motion to vacate its Order of November 7, 1951, dismissing plaintiffs' original complaint.

4. The District Court erred in dismissing plaintiffs' amended complaint upon the asserted ground that said amended complaint failed to state a claim for relief upon a written contract.

5. The District Court erred in dismissing plaintiffs' amended complaint upon the asserted ground that said amended complaint failed to state a claim for relief for reformation of a written contract based upon a mistake by plaintiffs as to the meaning and effect thereof which mistake was known or suspected by defendant at the time of the execution thereof.

6. The District Court erred in dismissing the plaintiffs' amended complaint upon the asserted ground that said amended complaint shows on its face that the action for reformation is barred by the Statute of Limitations.

7. The District Court erred in dismissing plaintiffs' amended complaint on the basis of allegations

contained in the plaintiffs' original unverified complaint and in defendant's unverified answer.

8. The District Court erred in dismissing plaintiffs' amended complaint without leave to amend and without resort to pre-trial conference or to a consideration of the depositions of the plaintiffs and of the officers of defendant corporation, which depositions were then on file with the court; and in accepting, as indicated in its opinion, statements of counsel in unverified pleadings as a substitute for valid evidence of the ultimate facts.

Dated this 21st day of October, 1952.

/s/ HERBERT BARTHOLOMEW,

/s/ PEMBROKE GOCHNAUER,
Attorneys for Appellants.

A copy of the within Statement of Points Upon Which Appelants Intend to Rely was served upon defendant Pickering Lumber Corporation and its attorneys of record herein by depositing a copy thereof in the United States mail at San Francisco, California, addressed to: John F. Downey, Ralph R. Martig, of Downey, Brand, Seymour & Rohwer, 500 Capital National Bank Building, Sacramento 14, California, on October 21, 1952.

/s/ HERBERT BARTHOLOMEW.

[Endorsed]: Filed October 22, 1952.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals, or certified copies of originals filed in this Court in the above-entitled case, and that they constitute the record on appeal as designated herein by the parties.

Complaint.

Notice of motion to dismiss.

Order, dated Nov. 7, 1951.

Notice of motion to vacate order dismissing the complaint dated and filed Nov. 7, 1951, and for leave to file amended complaint.

Memorandum, dated Jan. 3, 1952.

Amended complaint.

Motion to dismiss amended complaint.

Order dated March 26, 1952.

Answer of defendant Pickering Lumber Co.

Demand for jury trial.

Motion to dispense with jury trial on reformation issues.

Memorandum and order, dated Sept. 3, 1952.

Judgment of dismissal.

Notice of appeal.

Supersedeas bond on appeal.

Statement of points upon which appellants intend to rely.

Designation of contents of record on appeal.

In Witness Whereof, I have hereunto set my hand and the seal of said Court this 30th day of October, 1952.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ C. C. EVENSEN,
Deputy Clerk.

[Endorsed]: No. 13602. United States Court of Appeals for the Ninth Circuit. James V. McConnell and Margot Murphy McConnell, Appellants, vs. Pickering Lumber Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed October 31, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 13602

JAMES V. McCONNELL and MARGOT MURPHY McCONNELL,

Appellants,

vs.

PICKERING LUMBER CORPORATION, a Corporation,

Appellee.

STATEMENT BY APPELLANTS OF POINTS ON WHICH THEY INTEND TO RELY ON APPEAL

Appellants, James V. McConnell and Margot Murphy McConnell, refer to the Statement of Points upon which Appellants Intend to Rely, filed in the office of the Clerk of the United States District Court for the Northern District of California, Northern Division, on October 15, 1952, and incorporate said statement of points as fully as though said points were specifically set forth herein.

In addition to the foregoing, appellants hereby designate the following additional point upon which they intend to rely on appeal:

The District Court erred in entering judgment for defendant Pickering Lumber Corporation and against the plaintiffs.

Dated: November 19th, 1952.

/s/ HERBERT BARTHOLOMEW,
/s/ PEMBROKE GOCHNAUER,
Attorneys for Appellants.

[Endorsed]: Filed November 19, 1952.